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R. v. Allen, [2003] 1 S.C.R. 223, 2003 SCC 18

**Derrick Gordon Allen**

*Appellant*

v.

**Her Majesty The Queen**

*Respondent*

**Indexed as: R. v. Allen**

**Neutral citation: 2003 SCC 18.**

File No.: 29034.

2003: March 21.

Present: Iacobucci, Major, Binnie, Arbour and LeBel JJ.

on appeal from the court of appeal for newfoundland and labrador

*Constitutional law — Charter of Rights — Self-incrimination — Accused charged with second degree murder — Crown cross-examining accused on his prior testimony given at trials of other person involved in murder — Trial judge erring in permitting cross-examination — Canadian Charter of Rights and Freedoms, s. 13.*

*Criminal law — Parties to offence — Second degree murder — Charge to jury — Trial judge not adequately instructing jury on s. 21(1) of Criminal Code, R.S.C. 1985, c. C-46.*

### Cases Cited

**Applied:** *R. v. Noël*, [2002] 3 S.C.R. 433, 2002 SCC 67.

### Statutes and Regulations Cited

*Canadian Charter of Rights and Freedoms*, s. 13.

*Criminal Code*, R.S.C. 1985, c. C-46, s. 21(1).

APPEAL from a judgment of the Newfoundland and Labrador Court of Appeal (2002), 208 Nfld. & P.E.I.R. 250, 624 A.P.R. 250, 93 C.R.R. (2d) 55, [2002] N.J. No. 11 (QL), 2002 NFCA 2, upholding the accused's conviction for second degree murder. Appeal allowed.

*Derek Hogan*, for the appellant.

*Pamela Goulding*, for the respondent.

The judgment of the Court was delivered orally by

1 IACOBUCCI J. — Mr. Hogan, it is not necessary to hear from you. The Court is ready to pronounce judgment. Before doing so, the Court wishes to thank Ms. Goulding for her helpful submissions. Ms. Goulding, you could not have done more. The Court looks forward to your next appearance.

2           The appeal raises two issues: (1) whether the trial judge correctly instructed the jury in respect of s. 21(1) of the *Criminal Code*, R.S.C. 1985, c. C-46, and (2) whether the trial judge erred in law in permitting the Crown to cross-examine the appellant in respect to his prior testimony in the trials of Mr. Cousins.

3           Although the trial judge's initial directions to the jury on s. 21(1) when taken as a whole were adequate, we conclude, substantially for the reasons of O'Neill J.A., dissenting in the Newfoundland and Labrador Court of Appeal ((2002), 208 Nfld. & P.E.I.R. 250, 2002 NFCA 2), that the trial judge did not answer the jury's question with the clarity and comprehensiveness required by the applicable jurisprudence, thus giving rise to the possibility that the appellant was convicted by a jury that did not have an adequate understanding of the law on parties.

4           With respect to the second issue, our Court's recent decision in *R. v. Noël*, [2002] 3 S.C.R. 433, 2002 SCC 67 (which the trial judge and the Court of Appeal did not have the benefit of), dealt with cross-examination of an accused in respect of prior testimony in the light of s. 13 of the *Canadian Charter of Rights and Freedoms*. *Noël* held that s. 13 of the *Charter* provides that, when an accused testifies at trial, he or she cannot be cross-examined on prior testimony unless the trial judge is satisfied that there is no realistic danger that the prior testimony could be used to incriminate the accused. Applying that test to this appeal, we are of the view that the trial judge erred in permitting cross-examination of the appellant by the Crown with respect to the appellant's prior testimony, some of which included that he stated that he killed or thought he killed the victim, and that he stated that he held the murder weapon to his throat shortly after the murder. The Crown properly conceded that some of the questions were incriminating. In that connection, we see no basis to distinguish this case from that of *Noël*.

5           Accordingly, we would allow the appeal, set aside the judgment of the Newfoundland and Labrador Court of Appeal, and set aside the conviction and order a new trial.

*Judgment accordingly.*

*Solicitor for the appellant: Derek Hogan, St. John's.*

*Solicitor for the respondent: Department of Justice, St. John's.*

